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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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In the Matter of

Implementation of Sections 3(n)  
and 332 of the Communications Act

Regulatory Treatment of Mobile Services

GN Docket No. 93-252

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JUL 11 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

To: The Commission

**CONSOLIDATED REPLY COMMENTS OF  
USITV, INC. AND HUNTER ITV, INC.**

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## **SUMMARY**

Nextel's proposal to create an "ESMR block" ignores the rights of pending applicants. The proposal would establish a regulatory scheme in which Nextel, the only currently operating ESMR, would in many areas be the sole qualifier; others such as USITV, Inc. and Hunter ITV, Inc. would be peremptorily frozen out. Neither the Omnibus Budget Reconciliation Act of 1993 nor the goal of advancing the competitive balance among mobile service providers requires such a one-sided regulatory framework. The Commission already has been considering a methodology for wide-area SMR licensing. If it believes there is merit to Nextel's version, the Commission should provide a full and fair opportunity for comment in that context. In any case, the Commission cannot adopt a licensing regime which serves only Nextel's perceived need for "more market power" for itself, which would be wholly inconsistent with the procompetitive concepts recently and consistently articulated by all the Commission's members and embodied in the Budget Act.

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USITV, Inc. and Hunter ITV, Inc. (hereinafter collectively "Commenters"), acting through counsel and in accordance with Sections 1.415 and 1.419 of the Commission's Rules and Paragraph 154 of the Commission's Further Notice Of Proposed Rule Making, FCC 94-100, released May 20, 1994, in this Docket ("FNPRM"), hereby file their Consolidated Reply Comments in this Docket.

**I. INTRODUCTION**

1. Commenters are separate and independent licensees, as well as applicants, for 800 MHz Specialized Mobile Radio ("SMR") facilities under Part 90 of the Commission's Rules. The Commission has only recently granted Commenters' licenses. They also have various SMR applications pending with the Commission's Private Radio Bureau in Gettysburg, Pennsylvania, which were filed between October and December of 1993.

2. The focus of these Consolidated Reply Comments is the proposal advanced by Nextel Communications, Inc. ("Nextel") in its June 20, 1994 Comments ("Nextel Comments") in this Docket. Therein, Nextel asks the Commission, by way of implementing certain provisions of the Omnibus Budget Reconciliation Act of 1993, P.L. No. 103-66 ("Budget Act"), to "create a 10 MHz block of 200 contiguous 800 MHz frequencies exclusively for [Enhanced Specialized Mobile Radio] ESMR licensing defined on a Major Trading Area ('MTA') basis." Nextel Comments, at ii. Under the Nextel proposal, only those "licensees with an ESMR (wide-area) grant or ESMR application pending within the MTA as of August 10 1994" would be eligible to be licensed for this exclusive frequency block. Nextel Comments, at 16-17. Further, any existing SMR licensees operating on (and presumably applicants for) these exclusive frequencies would be "moved" to other, "equivalent 800 MHz private land mobile channels." Nextel Comments, at ii. These relocated licensees may or may not receive channels currently allocated for providing SMR.

3. Commenters licenses and pending 800 MHz SMR applications could be directly or indirectly impacted by the Nextel proposal. Therefore, Commenters clearly have an interest in the outcome of the Commission's decision on Nextel's request. Thus, Commenters have the requisite standing to file these Consolidated Reply Comments on the Nextel proposal. For the various reasons set out below, Commenters strongly oppose the Nextel proposal and urge the Commission to reject it. However, at a minimum, the Commission can

only adopt such a proposal after full and close consideration as part of a complete rulemaking process.

**II. Nextel's Proposal Makes No Provision For Pending Applicants**

4. The Nextel proposal essentially ignores the rights of pending 800 MHz SMR applicants such as Commenters. Nextel apparently concludes that all such applicants are mere "speculators" with little or no interest in developing their own SMR systems. See, Nextel Comments, at 7, 14. Nextel offers no support for this unfair, unwarranted, speculative conclusion.

5. Through established SMR frequency coordination procedures over a period of months, Commenters have devoted significant resources to identifying available SMR frequencies in the areas where they filed their applications. Having done so, Commenters contracted for the preparation and filing of applications in good faith reliance on the exiting SMR rules, rules which Nextel itself has employed to develop and field its own self-described "phenomenal" ESMR technology. However, Nextel's proposal would effectively disenfranchise the rights of these applicants on the unfounded, unsupported surmise that all are mere profiteers who have prepared applications in reliance upon the existing rules.<sup>1/</sup>

6. Moreover, the potential costs to Commenters and other pending applicants of revising their applications or business plans

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<sup>1/</sup> The Commission's pending proposal in Private Radio Docket 93-144 makes clear provision for dealing with pending applications. Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, 8 FCC Rcd 3950 (1993) ("Future Development of SMR Systems").

to accommodate Nextel's desire for exclusivity on SMR channels 401-600 is nowhere addressed in the proposal. Nextel's only concern is with the costs attributable to existing licensees. Nextel's total lack of concern for the status of pending applications is a gaping regulatory inequity. The Commission must reject the proposal as inadequate on that ground alone.

**III. Nextel's Proposal Could Create A Major Market ESMR Monopoly**

7. Nextel proposes that the only entities eligible to be licensed for its exclusive "ESMR block" would be those "with an ESMR (wide-area) grant or ESMR application pending within the MTA as of August 10, 1994." That deadline - set less than 60 days after Nextel filed its Comments - is a quite blatant attempt to set up an eligibility group populated exclusively by Nextel in most MTAs, and by perhaps a few of Nextel's ESMR colleagues in others.<sup>2/</sup>

8. Nextel justifies such a "no-notice" proposal, which would effectively exclude Commenters as well as many others from eligibility, to prevent the Commission "from being bombarded with ESMR applications upon the issuance of these rules." Nextel Comments, at 17. In other words, the Commission is asked to keep

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<sup>2/</sup> Significantly, according to a recent Memorandum from the American Mobile Telecommunications Association ("AMTA"), a leading trade association of SMR providers, "no other ESMR licensee supported Nextel's proposal." See, AMTA Memorandum to AMTA Members, July 6, 1994, at 1.

out the possibility of more competitors and reserve this exclusive ESMR block solely for companies like Nextel.<sup>3/</sup>

9. Such a proposal is totally inconsistent with the entire direction of the FCC's wireless communications policies. Recent Congressional testimony and statements by Chairman Hundt, as well as statements issued by his fellow Commissioners, have stressed the promotion of competition in the wireless field.<sup>4/</sup> One particular element of that message is to ensure access to opportunities for the non-Nextels of the world, the smaller, entrepreneurial businessmen or businesswomen who legitimately seek to enter the telecommunications business. The Budget Act sends a very similar message. Nextel's August 10, 1994 "cut-off" heads in exactly the opposite direction.<sup>5/</sup>

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<sup>3/</sup> Nextel concedes that it currently holds licenses in each of the SMR blocks, including what it proposes as the ESMR block. Nextel Comments, at 9. Nextel is the only operating ESMR in the country. See, Nextel Comments, at 48.

<sup>4/</sup> The D.C. Circuit of the U.S. Court of Appeals has warned the Commission that it must consider the anticompetitive effects of its decisions to establish regulatory and licensing frameworks for mobile communications facilities. National Ass'n of Regulatory Utility Commissioners v. F.C.C., 525 F.2d 630, 638 (D.C. Cir. 1976) ("The Commission retains a duty of continual supervision of the development of the [experimental cellular] system, and *this includes being on the lookout for possible anticompetitive effects.*") (emphasis supplied; footnote omitted).

<sup>5/</sup> Such a cut-off deadline, adopted largely in secret, without any advance notice to (or comment from) interested applicants or licensees, would be highly suspect from an administrative law perspective. See, McElroy Electronics Corporation v. F.C.C., 990 F.2d 1351, 1358 (D.C. Cir. 1993), citing Maxcell Telecom Plus, Inc. v. F.C.C., 815 F.2d 1551, 1558 (D.C. Cir. 1987).



10. Nextel claims that it is "highly doubtful that any market can economically support more than one ESMR." Nextel Comments, at 16. By its proposal, Nextel effectly has anointed itself as that single ESMR in many major U.S. markets. That decision should be left to the marketplace, not embodied in a regulatory scheme that makes an ESMR monopoly almost inevitable.

**IV. The Budget Act Does Not Mandate Approval Of Nextel's Proposal**

11. Nextel cloaks justification for adoption of its proposal in the "regulatory parity" provisions of the Budget Act.<sup>6/</sup> Nextel contends that to implement faithfully Congressional directive for "regulatory parity" the Commission must approve Nextel's "ESMR block" concept. In doing so Nextel stands the legislative underpinning for "regulatory parity" on its head.

12. Congress intended that the "regulatory parity" provisions of the Budget Act, which originated in the House of Representatives, redress a regulatory imbalance that existed between private carriers (such as SMR providers) and common carriers (such as cellular providers). As the House Committee on the Budget reported:

"Under current law [ ] private carriers are permitted to offer what are essentially common carrier services, interconnected with the public switched telephone network, while retaining private carrier status....The rates charged by common carrier licensees are subject to the requirements of title II of the Communications Act, which requires inter alia, that rates be just and reasonable and not

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<sup>6/</sup> The Commission itself has not concluded that the Budget Act even requires it to adopt comparable channel assignment procedures. FNPRM, supra, at 16, para. 29.

unreasonable (sic) discriminatory. Common carriers are also subject to state regulation of rates and services. Private carriers by contrast, are statutorily exempt from title II of the Communications Act and from rate and entry regulation by the states."

House Rep. No. 111, 103d Cong., 1st Sess., May 25, 1993, at 259-260 (footnote omitted). The purpose of the "regulatory parity" provisions effectively was to ensure that all those entities providing cellular-type services should be treated similarly from a regulatory perspective, "with the duties, obligations and benefits of common carrier status." 139 Cong. Rec. H3287, daily ed. May 27, 1993 (remarks of Congressman Edward Markey).

13. Thus, the Budget Act's directives to the Commission to establish "regulatory parity" arise out of the fact the private radio carriers heretofore were advantaged because they were effectively providing common carrier services without the regulatory responsibility and accountability applied to common carriers. The Congress prescribed an equalization of that regulatory burden so that private carriers did not continue to have this advantage.

14. Furthermore, the Budget Act does not require regulatory equivalence in all respects among commercial mobile service providers. It allows the Commission to conclude that "differences in the regulatory treatment of some providers of commercial mobile services" are justified. See, House Rep. No. 213, 103d Cong., 1st Sess., August 4, 1993, at 491 ("Budget Act Conference Report"). Thus, the Commission was left free to conclude that some provisions of title II would apply to some providers of commercial mobile

services and not to others. Budget Act Conference Report, supra, at 490-491.

15. Nextel complains that it needs more "market power" to compete effectively against cellular carriers. Nextel Comments, at 6.<sup>2/</sup> Nowhere does the Budget Act mandate the "competitive parity" which Nextel claims dictates Commission adoption of its ESMR block proposal.<sup>3/</sup> Rather, Congress left to the Commission the task of equalizing the regulatory requirements (e.g., rate regulation) to promote competitive conditions.<sup>2/</sup> Therefore, there is no requirement in the Budget Act that the Commission quickly adopt Nextel's proposal. Indeed, as noted above, in fundamental respects the Nextel proposal is inconsistent with the procompetitive policies of the Budget Act.

***V. The Technical And Other Implications Of Nextel's  
"Retuning" Proposal Must Be Fully Considered***

16. Nextel's proposal matter-of-factly represents that the channel-clearing necessary for establishing its "ESMR block" can be effected merely by "retuning" existing equipment operating on

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<sup>2/</sup> Indeed, Nextel seeks a competitive advantage over cellular providers because it wants ESMRs to be licensed on a broader geographic basis (i.e., MTA) and to be exempt from any cap on the amount of CMRS spectrum they can accumulate. See, Nextel Comments, at 16-17, 21-39.

<sup>3/</sup> Even if the Budget did so, it does not do so at the expense of small businesses and other entrepreneurial enterprises seeking to enter the telecommunications arena.

<sup>2/</sup> Certainly, to the extent the Nextel proposal would disenfranchise and push aside entities such as Commenters and reserve for Nextel and its ESMR confreres the "ESMR block", competitive conditions would not be promoted. Rather, competition would be severely and artificially restrained.

those channels. The Commission cannot merely accept this representation without careful analysis. To do so might lead to significant and severe disruption of existing operations, with a substantial financial impact on the business of such licensees. This is exactly what the Commission has warned against in the FNPRM itself. FNPRM, supra, at 17, para. 30.

17. Moreover, make no mistake about it, -- Nextel is advocating "moving" licensees, some potentially to channels not currently allocated to SMR use. The Commission is fully attuned to the complicated array of issues involved with "moving" existing licensees to other frequencies, no matter how proximate those frequencies might be. See, Redevelopment of Spectrum to Encourage Innovation in the Use of Telecommunications Technologies, ET Docket No. 92-9, RM-7981, RM-8004. The Commission cannot cavalierly proceed to approve such a proposal without carefully assessing what the complete range of such impacts would be and addressing each in turn. This process must involve solicitation of the views of existing and prospective licensees after they have had reasonable period to assess the Nextel proposal. But Nextel's timing here affords no such opportunity. The Commission would be ill-advised to decide such a technical and regulatory issue solely on the self-serving but unsupported representation by Nextel that there would be "no problem." From past experience, the Commission knows better.<sup>10/</sup>

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<sup>10/</sup> The National Association of Business and Educational Radio ("NABER") has already told the Commission in this Docket that  
(continued...)

***VI. The Current SMR Rules Have Not Hampered Nextel's  
Ability To Become An Effective Competitor***

18. Nextel further justifies the Commission's expeditious implementation of its proposal by August 10, 1994 on the grounds that the present SMR rule structure restrains its ability to compete effectively against existing cellular providers and future Personal Communications Services licensees. Nextel would have the Commission believe that without immediate approval of the proposal and implementation by August 10, 1994, Nextel may have to close its doors and succumb soon to its competitors' advantages.

19. Such a tale of woe belies what Nextel itself touts as its own ability, "by the end of 1996, to provide ESMR services to customers in 45 of the 50 largest wireless communication markets in the United States." Nextel Comments, at 5. Commenters believe that no other single provider of wireless communications, not even the largest cellular provider, will have such a market presence in its own right. Far from being "hampered" by the existing SMR rules, Nextel, through judiciously granted Commission waivers, has been able to raise hundreds of millions of dollars in investment capital, including a major investment by one of the country's largest interexchange telephone carriers, to develop what it describes as "phenomenal improvements in the effective use of SMR spectrum by ESMR operators" such as itself. Nextel Comments, at 5-6. Nextel's common stock has been a darling of Wall Street and,

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<sup>10/</sup>(...continued)

"complex licensing issues...should wait for a complete analysis instead of a rush decision that results in numerous petitions for reconsideration. Comments of NABER, June 20, 1994, at 3.

even with recent downward market trends, Nextel has a multi-million dollar market value.

20. Indeed, the Commission itself has already recognized that its existing rules "do not foreclose the growth of advanced and wide-area SMR systems." Future Development of SMR Systems, supra, 8 FCC Rcd at 3951, para. 5.

"Our rules have generally proven flexible enough to accommodate existing licensees that seek to convert their analog systems to wide-area systems employing advanced technologies. For example, Nextel Communications, Inc....is now developing wide-area systems in six areas of the country, almost entirely within the scope of our rules. In enabling Nextel and subsequent applicants to implement these systems we did, however, recognize that wide-area licensees might be unable to construct and begin to operate their innovative networks within the one year construction period set by our rules, and we therefore granted extended periods of time to implement the proposed systems."

Future Development of SMR Systems, supra, 8 FCC Rcd at 3951, para. 4.

21. The Commission has granted sufficient regulatory flexibility to allow Nextel's emergence and growth as a competitive force in the mobile communications field. The FCC need not precipitously do anything further in this Docket to stave off the possible withering of Nextel's evolution in the marketplace. As the Commission noted, through mergers contemplated as of June 9, 1993, Nextel then expected to serve markets within a combined population of 95 million people in areas approximately equivalent to 70 metropolitan statistical areas. Future Development of SMR Systems, supra, 8 FCC Rcd at 3950, n. 7. This is a very

significant market presence. It took cellular, even with all its exclusive frequencies, significantly longer to establish such a presence.

***VII. The Commission Is Already Considering Wide-Area SMR  
Authorization In the 800 MHz Frequency Band***

22. There is absolutely no need for the Commission to establish a wide-area SMR regime in the context of this Docket. The Commission, as Nextel properly notes, already has a long-standing rulemaking proceeding to establish a system of wide-area SMR licensing in the 800 MHz frequency band. See, Future Development of SMR Systems, supra.

23. In PR Docket No. 93-144, the Commission has proposed a system for licensing aggregated, exclusive, 800 MHz SMR channels on a Major Trading Area or Basic Trading Area basis. The Commission's own proposal addresses many of the issues raised by Nextel. The Commission's carefully crafted proposal has been the subject of the proper comment process. The Commission therein has indicated its commitment to providing the regulatory flexibility to develop wide-area 800 SMR systems. There is absolutely no need to address this issue in the context of implementing the Budget Act. As noted above, the Budget Act does not dictate Nextel's view of regulatory equality by August 10, 1994. Before it is adopted, there must be a full and fair opportunity for the Commission and interested parties to assess the impact of the Nextel proposal, not as part of reply comments to a rulemaking with a statutorily-imposed deadline.

**VIII. Conclusion**

24. Nextel's "ESMR block" proposal ignores the rights of pending SMR applicants such as Commenters. The proposal would potentially erase their application rights to certain channels without an opportunity to apply for the "ESMR block" themselves. It would leave Nextel in many major market areas of the country the sole eligible licensee for the "ESMR block". Such a proposal is anticompetitive and unfair. It is not required by the Budget Act; indeed, it is wholly inconsistent with the procompetitive tenor of that statute and the legislative intent behind it. Any wide-area SMR regime adopted by the Commission must give an equal and reasonable opportunity for all who meet fair and equitable qualifications to obtain such licenses. Nextel's proposal is antithetical to such a regime. It should not be adopted.<sup>11/</sup>

Respectfully submitted,

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Dated: July 11, 1994

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<sup>11/</sup> If, however, the Commission believes there is merit to Nextel's proposal, it must, as a matter of administrative law, give interested parties a full and fair opportunity to address its impact.



**CERTIFICATE OF SERVICE**

I, Lisa Y. Taylor, a secretary in the law firm of Besozzi, Gavin & Craven, do hereby certify that I have sent by U.S. mail, postage prepaid, or hand delivery on this 11th day of July, 1994, a copy of the foregoing **"CONSOLIDATED REPLY COMMENTS OF USITV, INC. AND HUNTER ITV, INC."** to the following individuals:

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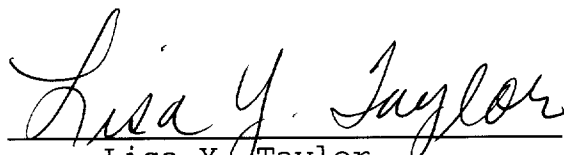
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